

“Position (legal) Paper”

**Professor Maristela Basso, Law School Largo São Francisco
Founding Member of the Society and Technology Study Center**

Legal and Social Sciences must consistently contribute to discussions on “Education, Society, and Technology”. For this reason, CEST/USP *intends to offer alternatives and solutions that allow integrating technological progress with* minimum ethical behavior standards that ensure respect with fundamental rights and guaranties of the individuals, in a centered and/or diffuse manner.

The creation of a legal framework on science and technology is underway, in Brazil and in other countries, with great potential to raise volatile discussions for the coming years. Legal aspects relevant for issues related to science and technology may be seen under the perspective of fundamental rights and guarantees, as well as problems related to consumer rights, privacy, new ethical standards adopted by companies and governments. Additional to the essentially international nature of problems and solutions that, certainly, are not limited to the territory of one single State, making not only regulation even more difficult, but also supervision and control.

Principles included in the legal agenda of concerns by CEST/USP are privacy, information protection, stability, safety and network functionality, as well as the civil liability of players and governance.

Efforts employed by the countries in the domestic sphere are to be praised, albeit insufficient. Brazilian legislative initiatives ought to be analyzed, including their global dimensions, under penalty of discovering a true mosaic of national legislations, unable to communicate or complement in view of cases that almost always cross borders, as the legal conception of jurisdiction is related to territory and nationality/residence.

Consider the possibility of using a chip, whether in a card or a subcutaneous implant, going to the supermarket and upon picking up a product, the price is discounted from your bank account. The use of money bills and even registries and credit cards is then unnecessary.

In this sense, similar to terms in the North-American legislation, Brazilian laws are not sufficient to face questions related either to public law or private law. These are not concerns raised by governments and parliaments.

Therefore, the application of domestic/national laws does not satisfy the need of greater protection for technology consumers, businessmen, users, and developers. Note that in Brazil, for instance, the mosaic of laws, sometimes in conflict, is as follows:

- (i) Federal no. 10973 dated 12/2/2004 (Scientific and Technological Innovation Law);
- (ii) Federal no. 9279 dated 5/14/1996 (Industrial Property Law);
- (iii) Federal no. 9610 dated 2/19/1998 (Copyright Law)
- (iv) Federal no. 11079 dated 12/30/2004 (Private Public Partnerships);
- (v) Civil Code;
- (vi) Code of Consumer Defense;
- (vii) Criminal Code;

(viii) 1988 Federal Constitution,

And more recently:

(ix) Internet Civil Framework (officially known as Law 12965 dated April 23, 2014).

In term of privacy law, four steps should be considered:

- (i) Information monitoring;
- (ii) Information registration;
- (iii) Information publication and disclosure;
- (iv) Consent granted by engaged parties

What do we propose as solution?

We understand that three fronts are the most important ones:

1. Legal regulation in the international sphere: “hard Law” or “soft Law”?
2. Ethical conduct rules followed by producers and manufacturers and service providers;
3. The use of technology by the consumer and protection against abuse.

Therefore, these are strongly rooted issues and questions that aim to offer the necessary support for the production sector (engineering) to develop and apply technological resources safely, profitably, and predictably. With the appropriate incentive.

Although “hard Law” offers some advantages, “soft Law” has more valuable characteristics: it is relatively easy to be prepared and amended.

Some experts believe that “soft Law” is considered a type of legal understanding catalyzer – whenever there are difficulties for governments and parliaments to legislate, they adopt soft Law. After some time, the natural rhythm turns it into a “hard Law” instrument.

One of the main characteristics of “soft Law” is its wide flexibility. However, this flexibility is also reason for criticism (by the most conservative parties), claiming lack of organization.

Another characteristic is that it removes partially or entirely the state regulating authority and provides it, at a maximum, with a supervising role.

“Soft Law” has been much used in international agreement with greater global approval, i.e. environmental agreements, issues related to human rights and international trade. There is a trend that it will be increasingly common in private/commercial/corporate/technological law agreements.

The scenario for “soft Law” is very positive: nations are aware that “hard Law” will have some difficulty to achieve an agreement regarding regulation on technological issues. This is why it is common knowledge that the approval of a “soft Law” instrument is much simpler, and it can be deemed as source of international law under the terms in article 38 in the Regulation of the International Court of Justice. A “hard law” (laws/treaties or convention) would be controversial

and difficult considering the differences between democratic regimes, territories and the size of populations, as well as the poverty rate of each country .

However, the proximity between public authorities and the private sector is greater in case of a “soft Law” instrument. As both are unquestionably relevant for this issue, their engagement is vital and must be taken into consideration while preparing a legal instrument.

It is important to note that this is not self-regulation, as this could cause conflicts purely based on economic power or political power of sectors and countries involved.

In conclusion, CEST/USP aims to contribute with the debate and present alternatives and solutions for problems identified here by means of regulation focused on principles and dynamics of the “New Lex Mercatoria”, which enables more appropriate direction towards the establishment of the costumes developed in preparation, promotion, and commerce of technology based on common, general, and transparent principles between the most important economies in the world.

It is clear that a governance regulation model for the development of societies concerned with science and technology must offer the following benefits, without limitation:

- (i) Transparency, competitiveness, greater access;
- (ii) Safety and predictability;
- (iii) Minimum ethical behavior standards;
- (iv) Privacy rules and users’ free choice;
- (v) Skills or qualifications for innovative activities and entrepreneurship